UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID B. NEWMAN and IRA F/B/O DAVID NEWMAN-PERSHING LLC as Custodian, on behalf of themselves and all Others Similarly Situated, and Derivatively on behalf of FM LOW VOLATILITY FUND, L.P.,

Plaintiffs,

v.

FAMILY MANAGEMENT CORPORATION, SEYMOUR W. ZISES, ANDREA L. TESSLER, ANDOVER ASSOCIATES LLC I, ANDOVER ASSOCIATES MANAGEMENT CORP., BEACON ASSOCIATES LLC I, BEACON ASSOCIATES MANAGEMENT CORP., JOEL DANZIGER, HARRIS MARKHOFF, MAXAM ABSOLUTE RETURN FUND, LP, MAXAM CAPITAL MANAGEMENT LLC, MAXAM CAPITAL GP, LLC, MAXAM CAPITAL MANAGEMENT LIMITED, and SANDRA MANZKE,

Defendants,

and FM LOW VOLATIVITY FUND, L.P.,

Nominal Defendant.

08-cv-11215-LBS

ECF Case

SUR-REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MAXAM CAPITAL MANAGEMENT LLC, MAXAM CAPITAL GP LLC, MAXAM CAPITAL MANAGEMENT LIMITED, AND SANDRA MANZKE'S OPPOSITION TO PLAINTIFFS' MOTION TO ALTER OR AMEND THE JUDGMENT AND TO AMEND THE COMPLAINT

In their Omnibus Reply Memorandum of Law, Plaintiffs assert that that "the law is clear in New York that [the MAXAM Defendants] have no standing to assert the pre-suit lack of demand defense". (Reply at 27-28.) Plaintiffs' argument is without merit. Delaware law, rather than New York law, governs whether Plaintiffs' claims should be dismissed for failing to make a demand or plead demand futility. *Kamen v. Kemper Fin. Servs. Inc.*, 500 U.S. 90, 108-09 (1991). Plaintiffs offer no authority for the application of New York law. Indeed, in multiple previous rounds of briefing on the sufficiency of their demand futility allegations, Plaintiffs have never contested that Delaware law applies.[1]

Even if New York law did apply (which it does not), Plaintiffs statement of that law is inaccurate. Under New York law, MAXAM Defendants have standing to assert the pre-suit demand defense. *See Kalin v. Xanboo Inc.*, 526 F. Supp. 2d 392, 408 n.7 (S.D.N.Y 2007). Plaintiffs' dismissal of *Kalin* in favor of the cases it cites is without basis. *Ripley v. Int'l Rys. of Cent. Am.*, 8 A.D.2d 310 (1st Dep't 1959) merely observed that it was "questionable" whether the third party could raise the defense and never made a determination one way or the other, and neither *Koral v. Savory, Inc.*, 276 N.Y. 215 (1937) nor *Patrick v. Alacer Corp.*, 84 Cal. Rptr. 3d 642 (Cal. App. 4th Dist. 2009) even addresses whether a third party has standing to assert the so-called pre-suit demand defense. The remaining cases cited by Plaintiffs do not apply New York law.[2] By contrast to Plaintiffs' authorities, the *Kalin* Court's holding was based on a well-reasoned

[1] Plaintiffs do not dispute, and cannot dispute, that under Delaware law MAXAM has standing to assert the pre-suit demand defense. *See Kaplan v. Peat, Marwick, Mitchell & Co*., 540 A.2d 726, 730 (Del. 1988); *see also Rales v. Blasband*, 634 A.2d 927, 934 n.9 (Del. 1993). Because Delaware law applies here, there is no doubt that MAXAM has standing to raise Plaintiffs' failure to adequately plead demand.

[2]*See Prager v. Sylvestri*, 449 F. Supp. 425 (S.D.N.Y. 1978) (examining demand requirement under a specific provision of the Securities Exchange Act); *Swenson v. Thibaut*, 250 S.E.2d 279 (N.C. App. 1978) (applying North Carolina law).

review of the legislative history of the New York statute and consideration of the implicated policy concerns, and constitutes the only clear statement of New York law on this issue.

Dated: New York, New York
January 28, 2011

Respectfully submitted,

KOBRE & KIM LLP

s/ Carrie A. Tendler

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To: All Counsel of Record